

COUNCIL AGENDA: 12/14/10  
ITEM: 4.1

# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Joseph Horwedel

**SUBJECT: TOBACCO RETAIL  
LICENSING PROGRAM**

**DATE:** December 2, 2010

Approved

Date

12/3/10

**COUNCIL DISTRICT:** Citywide  
**SNI AREA:** All

## **RECOMMENDATION**

Staff recommends that the City Council:

- a. Adopt an ordinance amending Title 6 of the San Jose Municipal Code to add a new chapter, Chapter 6.87, to license and regulate establishments engaged in the sale of tobacco and tobacco related products, as defined; and
- b. Adopt a resolution amending Resolution No. 75065, the City's Schedule of Administrative Fines, to establish fine amounts for violations of certain provisions of Chapter 6.87, to be effective January 1, 2011.

## **OUTCOME**

If the City Council approves the above recommendations, all retail establishments offering tobacco products and tobacco paraphernalia for sale to the public will be subject to annual licensing and inspections by the City and will be subject to regulations aimed at the following: a) reducing underage access to these products, b) preventing public nuisances, c) setting forth requirements for property maintenance, and d) establishing performance standards for these businesses which are consistent with those for retail establishments engaging in the sale of alcoholic beverages for off-site consumption. The regulations will also include provisions for enforcement of violations of the regulations including administrative and/or criminal citations, as well as suspension and/or permanent revocation of the license for unabated and willful violations.

## **BACKGROUND**

On June 15, 2010, the City Council, in adopting the Mayor's Revised June Budget Message, directed the City Manager and City Attorney to "...prepare an analysis for City Council consideration of a potential ordinance requiring retailers to obtain a license from the City in order to sell tobacco products and paraphernalia." (Mayor's Revised Budget Message, dated June 11, 2010).

On November 16, 2010, the City Council directed the City Attorney to bring forth a Tobacco Retail License Ordinance with the following policy recommendations:

- Develop criteria for exempting certain tobacco retail businesses that are not open to children under the age of 18; and
- Consider alternatives to the requirement that all tobacco products and paraphernalia be stored or kept out of public view.

## **ANALYSIS**

Staff estimates that there are approximately 855 tobacco retail establishments within San Jose's City limits. In light of this number, staff recommends the adoption of an ordinance establishing a regulatory and inspection program. Specifically, the Tobacco Retail License Ordinance ("Ordinance") would require businesses to first obtain a Tobacco Retail License ("License") from the City of San Jose before being allowed to sell tobacco products or tobacco paraphernalia. This License would have a one-year term, and retailers would be required to renew the License on an annual basis.

A License fee would be established to cover the time staff spends reviewing the application for the License and the time staff spends conducting an initial site inspection and additional compliance inspections to verify compliance with the regulations. To ensure that the program is 100% cost recoverable, staff is in the process of determining an appropriate License Fee. This fee proposal is expected to come forward early next year. Any additional inspections required due to violations, or as the result of a substantiated complaint within the calendar year, would be subject to a reinspection fee of approximately \$143, pursuant to Council Resolution 75334, once amended. This covers costs associated with the reinspection and billing process.

In addition, staff has proposed amendments to the administrative fine schedule that are intended to deter the sale of tobacco products to minors and ensure that tobacco retailers comply with other requirements as described in the Ordinance. Administrative fines will range from \$100 to \$2,500 for violations of the Ordinance, similar to the fines established for the Off Sale of Alcohol Beverage Program. For instance, the administrative fine for selling tobacco products to any person under the age of 18 will result in an administrative fine of \$2,500, and possibly subject the business to a suspension of their license.

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As discussed above, on November 16, 2010, the City Council directed the City Attorney to bring forth a Tobacco Retail License Ordinance with the following policy recommendations:

- Develop criteria for exempting certain tobacco retail businesses that are not open to children under the age of 18; and
- Consider alternatives to the requirement that all tobacco products and paraphernalia be stored or kept out of public view.

Staff is proposing to exempt any tobacco retail establishment that restricts anyone less than 18 years of age from entering the premises unless an adult accompanies that person.

Further, staff has removed the requirement that tobacco products or paraphernalia be stored out of public view and instead is simply requiring that no tobacco products or paraphernalia be offered from self-service displays.

On November 16, 2010, some Councilmembers posed the following questions and staff would like to provide the following additional information as Council considers adopting the proposed Tobacco Retail License Ordinance.

- *Provide a table that distinguishes current Federal, State and County requirements from the proposed Ordinance.*

A table has been attached summarizing San Jose's Tobacco Retail Licensing Program provisions with those of Federal and State agencies and with those of the County. (please see Attachment A).

- *Provide a list of the other Cities within the County of Santa Clara that have adopted similar regulations.*

As of January 2010, 96 cities and counties throughout the State of California have adopted tobacco retail establishment licensing ordinances and the County of Santa Clara's Public Health Department advises that Gilroy and Cupertino are currently developing ordinances as well. In addition, the cities of Campbell, Los Gatos, Monte Sereno, Milpitas, Morgan Hill and Palo Alto are in the process of submitting grant applications for the Communities Putting Prevention to Work (CPPW) program, funded through the American Recovery and Investment Act (ARRA).

In its November 10, 2010 Supplemental Memorandum to the City Council, staff advised that the County of Santa Clara's Public Health Department has notified the City of San Jose that they have been approved for \$128,190, the maximum allowable amount. These funds will be used to offset City costs for establishing the Tobacco Retail Licensing Program if the proposed Ordinance is adopted.

- *Develop additional outreach materials in languages other than English, Spanish and Vietnamese.*

Code Enforcement routinely produces outreach material in English, Spanish and Vietnamese. Staff will create additional outreach materials in Chinese and Tagalong, and any other language deemed necessary to ensure that tobacco retail establishments are fully informed of the licensing requirements.

- *Develop a "decoy program" to ensure that tobacco retailers are not selling products to minors.*

The City staff has started discussions with the County of Santa Clara's Public Health Department in identifying opportunities to work with non-profit organizations to assist in the development of a decoy program. The primary function of a decoy program is to ensure that tobacco retailers are not selling tobacco products or tobacco paraphernalia without first verifying that the purchasers of these products are of the legal age of 18 years or older. Code Enforcement Inspectors, as well as Peace Officers, will have the authority to enforce this provision.

#### Stakeholder Meeting Scheduled

On November 22, 2010, staff mailed invitations to 855 tobacco retail establishments, inviting them to attend one of two informational meetings scheduled for December 2, 2010 (please see Attachment B). The tobacco retail establishments were advised that staff would not be recommending that tobacco products or tobacco paraphernalia be stored out of public view and that an exemption to the licensing program would be recommended. In addition, staff intended to review the genesis for the establishment of the proposed Ordinance and review some of the draft Ordinance provisions to be recommended, including the following:

- Require all retailers of tobacco products or paraphernalia to obtain a City of San Jose Tobacco Retail License and pay the associated License fees.
- Require that a valid Tobacco Retail License be prominently displayed in a publicly visible location at the tobacco retail establishment.
- Prohibit the sale or transfer of tobacco products or tobacco paraphernalia to anyone under the age of 18. This would require retailers to first examine the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the tobacco product or tobacco paraphernalia.
- Prohibit a person who is younger than the minimum age established by state law for the purchase or possession of tobacco products to engage in tobacco retailing.
- Prohibit all self-service displays of tobacco products.

### **EVALUATION AND FOLLOW-UP**

Code Enforcement intends to commence the Tobacco Retail Licensing Program (Program) on July 1, 2011. As with any new regulatory inspection program staff believes that a significant investment needs to occur on the front end to ensure that businesses are aware of these new regulations before commencing the formal inspection program. If the Ordinance is approved, staff will request appropriation of the CPPPW/ARRA grant in the 2010-2011 Mid Year Review, along with a request to use the grant funds for a temporary overstrength Code Enforcement Inspector position from February through June 2011. This temporary position would develop and distribute informational brochures, as well as work with the Information Technology and Accounting staff to provide input to establish the fee. Staff would also utilize the CPPW/ARRA grant to fund start up costs to establish the Program, including the billing process, license applications, etc. In establishing the successful Off-Sale of Alcoholic Beverage Program, staff realized that the investment in outreach efforts spent in developing the program reduced the number of violations observed.

Additional recommendations to establish the licensing fees, appropriate revenue and expenditures, and add program staffing are anticipated to be brought forward in early 2011.

### **PUBLIC OUTREACH/INTEREST**

- ☐ **Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- ☐ **Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- ☐ **Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This memorandum will be posted on the City's website and on the front page of the Code Enforcement Division webpage, to provide Code Enforcement customers an opportunity to send comments to staff and participate in the Council meeting.

### **COORDINATION**

This memorandum was coordinated with the Office of the City Attorney and the Budget Office.

HONORABLE MAYOR AND CITY COUNCIL

December 2, 2010

**Subject: Tobacco Retail Licensing Program**

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**CEQA**

Not a project, PP10-068 (b).

/s/

JOSEPH HORWEDEL, DIRECTOR

Planning, Building and Code Enforcement

For questions, please contact Michael Hannon, Code Enforcement Official, at (408) 535-7826.

Attachments: Attachment A – Table

Attachment B – Invitation

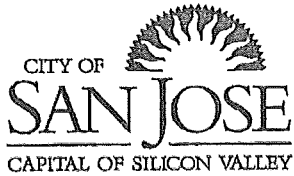
ATTACHMENT "A"

San Jose Ordinance	Santa Clara County (County Pockets Only)	California State Law	Federal Regulations
Require all retailers of tobacco products or paraphernalia to obtain a City of San Jose Tobacco Retail Establishment License and pay the associated fees.	Require all retailers of tobacco products or paraphernalia to obtain a City of San Jose Tobacco Retail Establishment License and pay the associated fees.	One time \$100 fee paid to the State Board of Equalization (Cal. Bus. & Prof. Code § 22973 and 22972)	None
Requires that a valid Tobacco Retail Establishment License be prominently displayed in a Publicly visible location at the licensed location.	Requires that a valid Tobacco Retail Establishment License be prominently displayed in a Publicly visible location at the licensed location.	Cal. Bus. & Prof. Code 22972(b)	None
Prohibits the sale or transfer of tobacco products or tobacco paraphernalia to anyone under 18. This would require that retailers must first examine the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the tobacco product or tobacco paraphernalia.	Prohibits the sale or transfer of tobacco products or tobacco paraphernalia to anyone under 18. This would require that retailers must first examine the identification of anyone appearing to be 30 years old or less to confirm that the recipient is at least the minimum age under state law to purchase and possess the tobacco product or tobacco paraphernalia.	Prohibits the sale or transfer of tobacco products or tobacco paraphernalia who reasonably appear to be under the age of 18.  (Cal. Bus. & Prof. Code § 22958; Cal. Penal Code 308)	Prohibits the sale or transfer of cigarettes or smokeless tobacco products ( <i>not paraphernalia</i> ) to persons who are under the age of 18  21CFR Part 1140.14
Prohibits a person who is younger than the minimum age established by state law for the purchase or possession of tobacco products to engage in tobacco retailing	Prohibits a person who is younger than the minimum age established by state law for the purchase or possession of tobacco products to engage in tobacco retailing	None	None
Prohibit all self-service displays of tobacco products.	Prohibit all self-service displays of tobacco products.	Prohibit all self-service displays of tobacco products (with some exceptions).  (Cal. Bus. & Prof. Code § 22962)	Prohibit all self-service displays of cigarettes and smokeless tobacco. (Some exceptions)  21CFR Part 1140.14
Allow a process for License suspension and revocation for violations of state law and the proposed ordinance, as well as an opportunity for hearing and appeal of the action.	Allow a process for License suspension and revocation for violations of state law and the proposed ordinance, as well as an opportunity for hearing and appeal of the action.	In certain circumstances, the BOE may suspend or revoke a retailer's state license  (Cal. Bus. & Prof. Code §§22974.4, 22974.7, 22974.8)	If there are numerous violations in a very short period, the FDA could institute a "no tobacco sales" order
Exempts businesses with signage posted on every entrance prohibiting those under 18 from entering the business without an adult	Includes all Tobacco retailers	None	Exempts "Adult-Only" facilities 21CFR Part 1140.4
None	Prohibits False and Misleading Advertising for	N/A	N/A

	Retailers with a suspended Permit.			
Window advertising (all type) limited to 25% of total allowed area (SJMC Title 20)	1) Requires Tobacco Products out of public view 2) No tobacco advertising  Limits window advertising for tobacco products to no more than 15% of total allowed area	The "Lee law" limits the amount of signage on the windows of off-sale alcohol retailers to 33%; since many tobacco retailers also sell alcohol, this would apply in some cases. B&P Code 25612.5	None	None
None	Flavored Tobacco Products Prohibited	None	Prohibits a cigarette or any of its components from containing as a constituent or additive any artificial or natural flavor (other than tobacco or menthol) or any herb or spice (including strawberry, grape, orange, clove, cinnamon, and vanilla) that is a characterizing flavor of the tobacco product or tobacco smoke. 21 U.S.C. §387g(a)(1)(A)	
None	Prohibits Tobacco Retailing within 1000 feet of a School (Allows existing businesses)	None	None	None
None	Prohibits Tobacco Sales at Pharmacies (Allows existing businesses)	None	None	None
None	Prohibits Tobacco Retailers to be permitted within 500 feet of another Tobacco Retailer (Allows existing businesses)	None	None	None
Tobacco Retail Inspections conducted Annually	Tobacco Retail Inspections conducted Annually	None	None	None



Allows Youth Decoys under the supervision of a peace officer or code enforcement officer	Allows Youth Decoys under the supervision of a peace officer or code enforcement officer	Allows Youth Decoys under the supervision of a peace officer or code enforcement officer	Allows Youth Decoys under the supervision of a peace officer, and other conditions (Cal. Bus. & Prof. Code §22952)	There is nothing currently in the FDA Law about the use of decoys, and there are no regulations on this as yet; enforcement of the youth restrictions in the FDA Law will be conducted by state agencies in contract with the FDA to <i>the maximum extent feasible</i> .
Allows Administrative Fines for Permit Violations as follows: \$500 for the first violation in a 12 month period \$750 for a second violation in a 12 month period \$1000 for third and subsequent violations \$2500 fine for confirmed sales to those less the 18yrs	Allows Administrative Fines for Permit Violations as follows: \$100 for first violation in 12 month period \$200 for second violation in 12 month period \$500 for third and subsequent violations	Allows Administrative Fines for Permit Violations as follows: First violation within 24 months – 30 day suspension Second violation within 24 months – 90 day suspension Third and subsequent violations in 24 months – One year suspension	Civil, criminal and product seizure	Civil, criminal and product seizure
Allows for Permit Suspension for Violations of Ordinance	Allows Administrative Fines for Permit Violations as follows: First violation within 24 months – 30 day suspension Second violation within 24 months – 90 day suspension Third and subsequent violations in 24 months – One year suspension	Provides fine and revocation appeal process	None	None
Provides fine and revocation appeal process	Provides fine and revocation appeal process	Provides fine and revocation appeal process	Court Process for Criminal and Injunctive Actions  In certain circumstances, the BOE may suspend or revoke a retailer's state license  (Cal. Bus. & Prof. Code §§22974.4, 22974.7, 22974.8)	No administrative process. Court Process for Criminal and Injunctive Actions



*Department of Planning, Building and Code Enforcement*  
JOSEPH HORWEDEL, DIRECTOR

November 19, 2010

Dear Business Owner:

**RE: TOBACCO RETAIL ESTABLISHMENT LICENSING PROGRAM**

The City of San Jose is considering an ordinance to establish a licensing program for tobacco products, and would like to invite you to attend one of two informational meetings on Thursday, December 2, 2010, from 9:00 a.m.-11:00 a.m. or from 6:00-8:00 p.m., in the Council Chambers at San Jose City Hall, 200 E. Santa Clara Street.

Please RSVP to Code Enforcement Supervisor Margaret Lafferty at (408) 535-7891.

In adopting the Mayor's Revised June Budget Message, dated June 11, 2010, the City Council directed the City Manager and City Attorney to "...prepare an analysis for City Council consideration of a potential ordinance requiring retailers to obtain a license from the City in order to sell tobacco products and paraphernalia."

On November 16, 2010, the City Council directed staff to bring forth the *Tobacco Retail Establishment Licensing Ordinance* for consideration. The City Council specifically directed staff to consider alternatives to our initial recommendation that would have required tobacco retailers to store tobacco products and paraphernalia out of public view. Therefore, staff will not include this requirement in the December 14, 2010 draft ordinance. In addition, Council requested that staff consider "exempting" businesses that are not open to members of the public under the age of 18, and staff will include possible exemptions for Council's consideration.

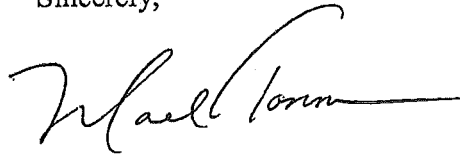
The draft ordinance will include some of the following provisions:

- Require all retailers of tobacco products or paraphernalia to obtain a City of San Jose Tobacco Retail Establishment License and pay the associated fees.
- Require that a valid Tobacco Retail Establishment License be prominently displayed in a publicly visible location at the licensed location.
- Prohibit the sale or transfer of tobacco products or tobacco paraphernalia to anyone under the age of 18. This would require that retailers must first examine the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the tobacco product or tobacco paraphernalia.
- Prohibit a person who is younger than the minimum age established by state law for the purchase or possession of tobacco products to engage in tobacco retailing.
- Prohibit all self-service displays of tobacco products.

Informational Meeting Notice  
Subject: Tobacco Retail Establishment Licensing Program  
November 19, 2010  
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If you should have questions in preparation for this meeting, please do not hesitate to contact Code Enforcement Division Manager Jamie Matthews at (408) 535-8288. I look forward to your participation.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Hannon", with a long horizontal flourish extending to the right.

Michael Hannon, Code Enforcement Official  
Planning, Building and Code Enforcement

MH:sck